

## Vattenfall's view on the EU Commission's proposal for the ePrivacy Regulation (2017/0003/COD)

### Executive summary

- Consumer energy data from smart meters enables demand response, aggregation, self-generation, peer-to-peer sharing, electro-mobility and other innovative services. Consequently, smart metering data is a key element for the energy transition and consumer engagement.
- While the ePrivacy Regulation marks an important step towards securing privacy in the area of on-line services, such as social platforms or advertising, it may affect the energy sector in a negative way. If the ePrivacy Regulation is not well aligned with the General Data Protection Regulation and the Electricity Directive it can bring uncertainty of the legal framework for smart metering and processing of data. The ePrivacy Regulation could obstruct the use of smart meters significantly by hindering collection, storage and processing of smart meter data, which is fundamental for the meters' functioning. The loss of smart metering would hinder innovation and lead to a much less greener planet. Therefore the ePrivacy Regulation should not be applicable to the energy sector and smart meter data in particular.
- If the ePrivacy Regulation does apply to smart meters, it should not hinder processing the data generated by them. This could be prevented if the Regulation recognizes the current status of contracts between suppliers and customers, as well as the legal obligations related to energy services, as legal grounds for handling electronic communication data.
- The ePrivacy Regulation should not discriminate with regard to the size of undertakings, or the legal composition of such company. Direct marketing under Article 16(2) of the ePrivacy Regulation should apply to all legal entities within the same group of companies (with strict consideration taken to the unbundling rules) during the full contract period.

### About Vattenfall and the importance of data to enable fossil free living

Vattenfall - one of the largest producers of electricity and heat in Europe- wants to enable fossil free living within one generation. For that purpose, Vattenfall aims at phasing out fossil fuels from energy production, rising the share of renewable energy sources, increasing electrification of transport and industry, as well as activating more consumers. Smart grids and smart meters play an important role for Vattenfall in achieving this goal. Smart grids are able to integrate growing shares of decentralised generation from renewable energy with increased demand from e.g. charging stations and to manage load flow control. Smart meters measure the electricity and thermo demand for each household and make the data readily available, which makes it possible for customers to influence their energy consumption patterns. Active customers have the opportunity to react on variable wholesale electricity price signals, which makes the demand side more flexible and the use of energy more sustainable. It is Vattenfall's task to help the customers succeed in this in a convenient way, without time consuming actions. The essential role of smart meters in empowering customers and enabling the energy transition is also highlighted in the recently adopted Electricity Directive.

Energy consumption data is used to detect outages and support reliable power supply in an energy efficient way. Energy efficiency increases, as the smart meter demand data enables further optimisation of the energy supply. Not collecting alerts from the meters, such as overvoltage, interruptions and zero sequence voltage is an inconvenience at best, but at worst a safety risk for the customer, as it increases the time it takes to signal and solve the issue. In the near future, the volume of electricity and thermal data will increase considerably, which will make the access to data and the use of smart grids and smart meter crucial.

Energy consumption will also constitute a basis for development of new types of energy services in the sector. In particular, new services likely to appear in the near future are those related to smart homes (thanks to the Internet of Things) and integrated solutions for home generation, self-consumption, peer-to-peer energy sharing and electro-mobility.

**The ePrivacy Regulation serves an important purpose, but some side-effects need to be considered**

Vattenfall appreciates the ongoing effort of the EU institutions to modernise data protection and privacy laws, and is highly committed to secure and lawful processing of customer data under the GDPR and the related provisions of the newly adopted Electricity Directive. Vattenfall welcomes the EU Commission's proposal for the ePrivacy Regulation (2017/0003/COD) and its objective to complete the GDPR framework with stricter rules on electronic communication services, in particular those aimed at alleviating ever-growing risks stemming from extensive use of social media and smart phones, computers or other highly-personalised devices.

While the intention of the ePrivacy Regulation is clear, its scope will affect the energy industry to a large extent. Firstly, the scope of the current draft includes not only personal data, but also technical and business data. Secondly, the ePrivacy Regulation's requirements apply to all electronic communications services<sup>1</sup>, even to machine-to-machine communication<sup>2</sup>, therefore smart meter systems processing energy consumption data seem to be included in its scope.

Today, the legal basis to collect, store and process data from the customers smart meters is governed by the GDPR (EU Regulation 2016/679) and/or national law and contracts between suppliers and customers, which are GDPR-compliant. On this basis, data can be collected on the grounds of a service contract with a consumer or a legal obligation to perform a service in a certain manner (e.g. legal requirements on frequency of billing). In the future, consumers' access to their energy consumption data will be covered by secondary legislation adopted on the basis of the Electricity Directive, in line with the GDPR. Moreover, under Art. 35 of the GDPR, smart meter systems' operators are required to perform a data protection impact assessment, aimed at privacy protection beyond a mere GDPR compliance. Vattenfall believes this framework provides a more than adequate protection of the processing of (energy) data from smart meters.

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<sup>1</sup> Definition of electronic communications service is stated in the DIRECTIVE (EU) 2018/1972

<sup>2</sup> Machine to machine communication is defined as services involving an automated transfer of data and information between devices or software-based applications with limited or no human interaction

If the ePrivacy Regulation, in addition to the above extensive regulation, requires consent for processing smart meter data<sup>3</sup>, this is likely to have significant consequences for the energy sector, its customers and the speed of the transition. Suppliers and smart meter operators will have to extend the data protection processes to technical and business data. If customer consent is not given or is withdrawn without notice, it could endanger the security of the system and supply. Costs would increase significantly, as customers lose insight into their energy consumption, no longer get specified bills and energy consumption data needs to be collected manually and physically at each customer's home. Naturally, this would be a serious step back, rather than a step toward the energy transition, energy efficiency and an increasingly proactive role of customers and should be avoided.

Energy services are fundamentally different from on-line services using cookies. In the case of electricity supply, demand response, aggregation, electro-mobility, prosumers' solution and related topics, electronic communication via smart meters constitutes a supportive role, instead of it being the main purpose of the service. Additionally, the Electricity Directive is already fully aligned with the GDPR, removing the need for additional regulation. Consequently, ePrivacy Regulation, in particular its Art. 8, should not be applicable to the energy sector and smart meter data in particular. Any unforeseen privacy issues arising regarding the use of smart meters, can be addressed in the implementing act on access to consumption data, under the Electricity Directive 2019, after a due public consultation of energy-specific privacy concerns.

The European regulatory framework should provide a level playing field for all the market participants and should not discriminate with regard to the size of undertakings. Larger market actors, like Vattenfall, are well-placed to engage in innovation and offer customers new types of products and services. In complex structures, such as Vattenfall, particular services may be developed or managed by different legal entities. We strongly believe customers should be able to benefit from the complete portfolio of products that companies have to offer. Easy single-contact access to the complete Vattenfall product portfolio, with strict application of the unbundling rules, provides transparency and efficiency for both the customer and the supplier, in this case Vattenfall. This is facilitated if the exception regarding direct marketing, stated in article 16 (2) of the ePrivacy Regulation, is extended to apply to other legal entities within the same group company, which we believe should be the case.

In addition to the above mentioned issue regarding the entity that can contact the customer, we believe the allowed period of customer contact also requires clarification. Vattenfall aspires to support its customers to live a climate-smart life, by helping them reduce their carbon footprint. To be able to offer the customer services for sustainable, efficient and fossil-free energy consumption, based on their individual energy needs, it is crucial to be able and allowed to contact these customers, throughout the full contract period.

The proposed text in art. 16 (2a) allows Member States to limit the period during which customers can be contacted, based on when the product or service was sold. To avoid that this period of allowed contact ends before the supply or service contract ends, Vattenfall sees the need for clarification in the text of the draft Regulation:

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<sup>3</sup> Art. 8 of the ePrivacy Regulation states that collection, processing and storage of information from the end-user's terminal equipment is prohibited. This is followed by a list of exceptions, of which one is (b) the end-user has given his or her consent;

“Member States may provide by law a set period of time, *starting on the last day of the contract* within which a natural or legal person may use contact details of the end-user who is a natural person for direct marketing purposes, as provided for in paragraph 2.”

Alternatively, art. 16 (2a) could be replaced or aligned with the existing regulation under the GDPR.

### **The Council’s amendments could benefit digitalisation**

In the amended version of the ePrivacy Regulation from 8 November 2019, the Finnish Presidency of the Council has proposed the following change proposals, which allow smart meters to play a significant role in the transition to an increasingly digital Europe:

- The proposed change to art. 8 (1)(c) “it is necessary for providing a service requested by the end-user;” would limit the risk of hindering smart meters if it is made clear that it covers the whole chain of the service, i.e. the full solution. A full solution is often composed of different sub-solutions, which depend on each other e.g. the energy consumption data from smart meters can be used for supply optimisation, control of grids, billing and for offering customised solutions such as the “time of use pricing” contract. The full solution could be hindered if a separate consent is needed for each sub-solution or if the consent can be withdrawn at any time.
- Art. 11 (1) of the original ePrivacy Regulation proposal gives Member States the possibility to limit the scope of the Regulation through national legislation. Vattenfall strongly supports this provision, as it allows national interests and particularities to be taken into account. Alternatively, there could be a general exception for smart metering data in the ePrivacy Regulation.